No. 12937

United States
COURT OF APPEALS
for the Ninth Circuit

MARYLAND CASUALTY COMPANY, a corporation,
Appellant,

vs.

SIDNEY F. PATON and LOIS ELEANOR PATON,
Doing Business as PARAMOUNT SERVICE,
Appellees.

APPELLANT'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court in this case is based upon 28 U.S.C.A., Section 1332, this being a civil action in which the matter in controversy exceeds the sum of $3,000, exclusive of interest and costs, and is between citizens of different states. The plaintiff is a citizen of Maryland (Paragraph I, Agreed Statement of Facts, Tr. 29) and the defendants are citizens of Cali-

fornia (Paragraph IV, Agreed Statement of Facts, Tr. 29) and the matter in controversy is $6,300 (Paragraphs IX and X, Agreed Statement of Facts, Tr. 31, 32).

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of the Court of Appeals to review the judgment of the District Court (Tr. 49) is based upon 28 U.S.C.A., Section 1291, said judgment being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sections 1252, 1253.

CONCISE STATEMENT OF THE CASE

On October 2, 1947, James Buie was instantly killed in a collision between his automobile and a truck owned by the defendants and operated by their employee. This accident occurred in Oregon (Tr. 29, 30, 31).

James Buie was, at the time of his death, acting in the course of his employment by James T. Moore. This employment relation was contracted in the State of California, and was therefore within the provisions of the California Labor Code and Workmen's Compensation Act (Tr. 29, 30, 31).

After Buie's death, his widow, Norma Buie, applied to the California Industrial Accident Commission for death benefit compensation. She received an award of $6300, which the appellant was ordered to pay pursuant to the terms of the Workmen's Compensation Liability

policy maintained with it by James Moore (Tr. 29, 30, 31).

This action was commenced on May 3, 1950, more than two years after the death of James Buie (Tr. 55). The object of this action is to recover from appellees the amount so awarded to Norma Buie. Appellant alleged in its complaint (Tr. 3-24) that the death of James Buie was attributable to the negligence of appellees' employee in the operation of their truck. This issue of negligence is assumed in appellant's favor for the purposes of this appeal.

On May 3, 1950, appellant filed its complaint in the U.S. District Court for the District of Oregon. This complaint alleged the facts just summarized. Thereafter, the appellees filed a motion to dismiss appellant's complaint (Tr. 26), and a motion for summary judgment (Tr. 24). These motions were based on two theories: (1) That appellant's only cause of action is one for the wrongful death of Buie under the Oregon Wrongful Death statute (Section 8-903, O.C.L.A.); and that such an action must be commenced within two years of the date of death (Section 8-903 O.C.L.A.), which appellant admittedly did not do; and (2) that appellant failed to state a claim upon which relief could be granted.

The District Court, upon argument of appellee's motion, declined to rule thereon before a pre-trial order was drafted. Therefore, the parties prepared a pre-trial order (Tr. 28 to 48) containing an "agreed statement of facts" (Tr. 29-32), and an Appendix (Tr. 34-48) containing statutory material deemed applicable to the case. This

pre-trial order reserved any consideration of the issue of negligence upon which appellee's liability will ultimately depend (Tr. 28, 33); but the pre-trial order admitted all of the other basic facts summarized above.

The District Court, after considering the text of the pre-trial order and briefs submitted by the parties, entered a final judgment order that the appellee's motions should be allowed and that appellant's action should be dismissed (Tr. 49). This appeal is taken from that final judgment order.

CONTENTIONS OF APPELLEES

Appellees contend that under the Agreed Statement of Facts, the only possible action arising out of James Buie's death is one for wrongful death under the Oregon wrongful death statute (Sec. 8-903, O.C.L.A.), and that the statutory limitation contained in said Section 8-903, O.C.L.A., had expired before the plaintiff commenced this action. The provisions of said Sec. 8-903, O.C.L.A., were, at the time of Buie's death and at the time this action was commenced, as follows:

> "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $10,000."

CONTENTIONS OF APPELLANT

Appellant contends that the agreed statement of facts set forth a claim upon which relief can be granted and that such claim is not one for wrongful death nor barred by any statute of limitations. Appellant contends that it is entitled to recover in its own right, as an indemnity insurer which has been ordered to pay workmen's compensation for injuries resulting from defendant's negligence. Appellant asserts that this action should be sustained as one defined and created by the laws of California under which said compensation was paid (Labor Code, California, Sections 3852, 3853, 3854, et seq.; Tr. 45, 46); or as one in the nature of a common law proceeding for indemnity.

SPECIFICATION OF ERRORS

(1) The Court erred in allowing Appellees' Motion for Summary Judgment based upon the admitted facts in the Pre-Trial Order.

(2) The Court erred in allowing Appellees' Motion to Dismiss based upon the admitted facts in the Pre-Trial Order.

ARGUMENT

Shed of detail, the elementary facts and permissable assumptions to which the ensuing argument is directed are these: James Buie was killed in Oregon while em-

ployed under a California contract of employment to which the California Workmen's Compensation Act applied. The appellant, as the insurer of Buie's employer, was ordered by the California State Industrial Accident Commission to pay Buie's widow a death benefit.

The appellant now sues the appellees, declaring that the cause of Buie's death, and hence the origin of plaintiff's obligation to Buie's widow, was the negligent operation of defendant's truck by defendant's employee.

Two basic issues to be decided upon this appeal are whether the appellant acquired by virtue of the above facts an enforceable claim against appellees, and, if so, whether such claim has been barred by any statute of limitations.

These issues may be framed more specifically in terms derived partly from acquaintance with the proceedings and briefs in the District Court:

> 1. Appellees have stated that if Buie's death is imputable to the negligence of appellees' employee, then the only cause of action that can accrue is one for wrongful death; that this cause of action is governed solely by the lex loci delicti, in this case the Oregon wrongful death statute; that the Oregon wrongful death statute contains a two-year limitation, and the appellant is precluded from this action by the fact that more than two years elapsed between Buie's death and the commencement of this cause.
>
> Appellee's position is, of course, that the law of California can confer no rights upon appellant which are enforceable in this action.
>
> 2. Appellant advances two theories, each of which identifies appellant's claim essentially as one

in the nature of restitution: a right to recover from appellees for the loss and liability which appellees' actively wrongful conduct imposed upon appellant.

One of these theories is based on the express language of the California Labor Code; the other is simply an application of the common law doctrine of indemnity.

Under either theory, the appropriate period of limitations had not expired before the commencement of this action. (See Appendix, p. 37)

Having stated the basic factors of the dispute, it is well to amplify somewhat the appellant's expression of its case. As will be seen, the common law furnished the appellant with a cause of action for "indemnity," which may be described as a quasi-contractual action for restitution of the sum the plaintiff paid as a result of an act for which the defendant was primarily responsible and for which the defendant should recompense the plaintiff. The mere statement of the doctrine indicates its equitable nature and its special utility to insurers. In addition to the common law action for "indemnity," appellant relies upon portions of the California Labor Code, which have an effect almost identical to the common law action for "indemnity," and which are invoked by facts which would support a common law action for indemnity.

Since both theories enable the insurer of an employer to proceed directly against a third person whose negligence has exposed the insurer to compensation liability, they are substantially identical in result and application. However, clarity demands that they be separately discussed in this brief.

A. Appellant's Right to Recover Under the California Labor Code

I. The Statutory Basis of the Insurer's Right.

The California Labor Code provides expressly for a situation in which an employee is injured or killed by the fault of someone other than his employer. In that event, the employee (or his beneficiaries) may claim compensation from his employer (or the employer's insurer). The employer (or insurer) may sue the wrongdoer for reimbursement of the compensation liability.

Where an employee subject to the California Workmen's Compensation Act is injured or killed by the negligence or fault of some person other than his employer, the employee or his beneficiaries may claim compensation from his employer. In such a case, California Labor Code, Sec. 3852 provides:

> "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event, the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension, or other emolument paid to the employee or to his dependents."

Section 3851 of the California Labor Code provides that "The death of the employee or of any other person does not abate any right of action established by this chapter."

At this juncture, the statutory definitions become very important. Section 3209 of the Labor Code states that "*Damages* means the recovery allowed in an action at law as contrasted with compensation." An "*employee*" includes "the person injured and any other person to whom a claim accrues by reason of the injury or death of the former" [Labor Code, Sec. 3850 (a)] and "'*employer*' includes insurer as defined in this division" [Labor Code, sec.. 3850 (b)].

Section 3852 may now be paraphrased in terms which are justified by the statutes, and which are more consonant with this case:

> Any insurer of an employer who pays or becomes obligated to pay compensation may likewise bring an action against such third person. In this event, the insurer may recover in the same suit the following items: the total amount of compensation and all other damages for which the insurer was held liable.

Section 3854 of the Labor Code plainly denotes the scope of the employer's (or insurer's) action against the tortfeasor:

> "If the action is prosecuted by the employer (insurer) alone, evidence of any amount which the employer (insurer) has paid or become obligated to pay by reason of the injury or death of the employee is admissable, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom. After recouping himself for such special damages . . . the employer shall pay any excess to the injured employee or other person entitled thereto." (Partial quotation, matter in parantheses supplied.)

II. Interpretation of Employer's Statutory Action; California Decisions.

1. *The cause of action is not based on liability for personal injuries.*

The California courts have consistently held that the employer (or his insurer) is the possessor of a cause of action *separate and distinct* from the injured employee's cause of action against the tortfeasor. This cause of action is for property damage to the employer or the insurer, not for the injury to the employee.

This is exemplified in *Limited Mutual Compensation Insurance Co. vs. Billings,* 74 Cal. App. (2d) 881, 169 P. 2d 673. Here the insurance carrier for an employer sued to recover amounts paid as compensation and medical benefits to two injured employees, on the ground that their injuries resulted from the negligence of the defendants. The action was commenced more than one year but less than three years after the employees were injured. The period of limitations for negligent personal injury was one year; that for property damage and for a "liability created by statute" was three years.

It was held that the insurer could maintain the action. Describing the insurer's cause of action, and applying the statutes mentioned above, the court said:

> "These provisions establish a right of action in favor of the employer and make the third party directly liable to the employer where such an action is brought.
>
> * * * * *
>
> "The appellant contends that this new right of action, thus given to the employer by these sections,

is based entirely upon these statutes and that such an action is one 'upon a liability created by statute' and governed by subd. 1 of section 338, C.C.P., and, further, that it is an action based upon an injury to a property right, thus also coming within the provisions of subd. 3 of section 338, C.C.P. On the other hand, the respondents contend that these sections of the Labor Code, and their predecessors, impose no new liability upon the negligent third party, that the employer is merely subrogated to, or substituted in, the long established right of the employee to sue the third party, and that it follows that the employer or his insurance carrier, like the employee, is subject to the one year limitation imposed by subd. 3 of section 340, C.C.P.

"While some cases may involve a mere matter of subrogation without independent right, sections 3850, 3852 and 3854 give a new and specific right to the employer and his insurance carrier. That this right of action against a third party who may have caused the injury to the employee which, in turn, has caused an injury to the employer or his insurance carrier, who has been obligated by law to compensate the employee to a certain extent, is not only a statutory right which is based upon a statutory liability, but one entirely separate and distinct from the right of action long enjoyed by the employee, has been recognized in several decisions in this state." 169 P. 2d 673, 675, 676.

In *City of Los Angeles vs. Howard,* 80 Cal. App. (2d) 728, 182 P. 2d 278, an employer (the city) sued the estate of a tortfeasor for recovery of compensation and other benefits paid to the city's injured employee. On the theory that the employer's claim was a tort claim which would not survive the death of the tortfeasor, the latter's administratrix contested the liability. It was held, however, that the employer's claim was one for property damage, and could be asserted against the estate:

"[1] The sole question presented for determination herein is whether an employer may maintain an action against the estate of a deceased person to recover the money he has expended under the provisions of division 4 of the Labor Code because of injury to or death of his employee, proximately caused by the negligence of such person during his lifetime? Our answer to this query is in the affirmative.

"[2] The cause of action alleged in plaintiff's complaint differs from the injured employee's common law action for damages. The legislature, by the enactment of section 3852 of the Labor Code, created a new cause of action for the employer entirely separate and distinct from the right of action of the employee. *Limited Mutual Comp. In. Co. vs. Billings,* 74 Cal. App. 2d 881, 882, 169 P. 2d 673.

* * * * *

"The payment by plaintiff of money for medical attention and compensation to its injured employee pursuant to the obligation imposed upon it by the provisions of the Labor Code caused a property injury to plaintiff within the meaning of section 574, Probate Code. *Morris v. Standard Oil Co.,* 200 Cal. 210, 214, 252 P. 605; *Hunt v. Authier,* supra, 28 Cal. 2d at page 296, 169 P. 2d 913. Plaintiff's complaint against the administratrix of the estate of the tortfeasor for recovery of the moneys so expended states a proper cause of action and the demurrer of defendant should have been overruled." 182 P. 2d 278, 279.

2. *The cause of action is not derived from the injured employee by subrogation to his rights, if any.*

The interpretations of the California Labor Code refute any argument that the employer or insurer is

merely subrogated to the injured employee's cause of action.

In *California Casualty Indemnity Exchange v. United States,* 74 F. Supp. 401, decided in the Southern District of California, District Judge Hall compared the position of an employer, suing a third party under the provisions of the Federal Longshoremen's and Harbor Workers' Act, with the position of an employer (or insurer) who seeks such relief under the California Labor Code:

> "The right of recoupment on the ground of third party liability is not a right *created* in the libellants by statute *as in the California Compensation Act.* California Code Sec. 3852; *Morris v. Standard Oil,* 200 Cal. 210, 252 P. 605. The difference lies in the fact that the rights of the employer and its insurance carrier under the Longshoremen's Act result solely by an assignment of the original rights of the injured person, which original rights are not created by the Statute. The act of the injured person, or representatives of decedent in seeking and accepting compensation under the Longshoremen's Act, operates as an assignment of those rights and *creates no new right of action in the employer as is done in the California Law.* The assignee has and can have no greater right than the assignor. *Webster v. Clodfelter,* 76 U.S. App. D.C., 171, 130 F. 2d 434." (Italics in text supplied)

The cases previously discussed, *Limited Mutual Compensation Insurance Co. vs. Billings,* 74 Cal. App. 2d 881, 169 P. 2d 673, and *City of Los Angeles v. Howard.* 80 Cal. App. 2d 728, 182 P. 2d 278, of course, also directly state that the employer's or insurer's right of action against the third party tortfeasor is *not* obtained

merely by a subrogation or succession to the employee's cause of action, *but is a new distinct claim accrued from the damage to the employer or insurer.* This discrimination is of essential importance. If the Maryland Casualty Company merely succeeded to the rights of Buie's widow as a consequence of its duty to pay her death-benefit compensation, then it would be apparent that the Company would be, in substance, attempting to prosecute her wrongful death cause of action which was created by Oregon Law, since the accident occurred in Oregon. The obvious procedural straits that would attend such an action (since the Company is not eligible to enforce such a claim directly) would have been averted by the expiration of the two-year statute of limitations. Indeed, appellees have mainly propounded and relied upon this very hypothesis, that appellant's only remedy is based upon the Oregon wrongful death statute.

Instead of enforcing a claim for wrongful death, on the theory that it had been transferred to the Company by some process of subrogation, the true nature of the Company's case stamps it as *an original cause of action for property damage.*

It may be acknowledged that the insurer's cause of action is ultimately founded in the tortious wrongdoing of the third-party defendant. But the insurer's action is not for the immediate consequences of that wrongdoing —it is not for the wrongful death—it is for the damage and loss that resulted to the insurer because of the wrongful death. From another perspective, it is almost identical with the principle of indemnity: the plaintiff

has discharged a liability which the defendant ought to pay and which arose from the defendant's active wrongdoing.

The plaintiff having acquired a new, original and distinct cause of action, which the California law characterizes as one based on property damage, then the statute of limitation governing such actions should apply. Moreover, the Oregon limitation must be consulted, since a limitation is a procedural matter governed by the law of the forum. As a comparison of the pertinent statutes of limitation will prove (Appendix, pp. 37, 39) Section 1-204 (2), (4), O.C.L.A., is identical with sec. 338 (1), (3), Code of Civil Procedure of California, which was held applicable in the case of *Limited Mutual Ins. Co. vs. Billings,* supra. The period of limitations being six years in Oregon, this action was timely brought.

III. Enforceability of California Statutory Cause of Action in Oregon—the Conflict of Laws Question.

One of the contentions that can be made by appellees is that since Buie died in Oregon, the law of Oregon applies exclusively and appellant therefore cannot rely on the statutory action given it by the California Labor Code. Possibly such a contention would have been a formidable one at an earlier date, prior to the formulation of the conflict of laws principles relating to workmen's compensation.

Under classical general conflict of laws principles developed in other fields, it might be said that since Buie

was killed in Oregon, the Oregon law would govern the nature and incidents of any liability arising out of his death. However, under the body of conflict rules which has developed since the workmen's compensation acts have been adopted and which pertain peculiarly to this field of labor law, it is clear that appellant could be, and was, required to pay compensation under the law of California for a death which occurred in Oregon (See Restatement of the Law of Conflict of Laws, Section 398). If the California law had no application here, this action would never have arisen because appellant would not have been subjected to liability for the award to Buie's widow made under California law.

In *Sloan v. Appalachian Electric Power Co.*, 27 F. Supp. 108, a diversity case arising in the Courts of West Virginia, it appeared that Sloan, who was covered by the Workmen's Compensation Act of Kentucky, was injured in West Virginia and brought a personal injury action in West Virginia against the third party who caused his injury. The insurance carrier against whom an award was made under the Kentucky Workmen's Compensation Act sought to intervene on the ground that the carrier was given such right under the Kentucky statute. Sloan resisted the intervention on the ground that the accident occured in West Virginia and therefore West Virginia law applied and no rights could be asserted under the law of another state. In disposing of this contention the Court said:

> "Plaintiff says that since the accident happened in West Virginia the West Virginia law should govern this question of intervention, and that in West

Virginia an employer has no right of subrogation against a third person who negligently injures an employe for which injury the employe receives compensation. I cannot agree that the West Virginia law controls this question.

"It is true that the law of West Virginia, where the accident occured, determines the question of negligence, but the law of Kentucky determines the rights of the parties under plaintiff's contract of employment. The contract of employment was entered into in Kentucky, and the provisions of the Kentucky Compensation Act became a part of that contract of employment, so that the insurance company's right of subrogation is not only statutory but contractual.

"Plaintiff himself has recognized the applicability of the Kentucky Compensation Act by making claim and receiving compensation thereunder. The rights of the parties to that contract of employment must be enforced in accordance with the Kentucky law, irrespective of the place where the accident occured or the place where the suit is instituted. The motion to intervene is granted." 27 F. Supp. 108, 109.

In the case of *Biddy v. Blue Bird Air Service,* 374 Ill. 506, 30 NE (2d) 14 (1940), Biddy was killed in Illinois and his administratrix brought suit in Illinois to recover for his wrongful death. It appeared that Biddy was subject to the Michigan Workmen's Compensation Act and the defendant pleaded an award made thereunder which had the effect under Michigan law of giving the cause of action arising out of Biddy's death to his employer, who was therefore the proper party plaintiff. In sustaining this defense, the Court makes it clear that the foreign law does apply and gives the constitutional basis for so holding as follows:

"Section 1 of article 4 of the Federal constitution declares that full faith and credit shall be given in each State to the public acts of every other State and it is settled that a statute is a public act within the meaning of that clause. (Citing cases.) It is equally well established that full faith and credit applies only to those acts which are within the legislative jurisdiction of the State enacting them. (Citing cases.) It does not follow, however, that a State is without power to enact legislation providing for compensation to local employees employed under a contract made locally for injuries occurring beyond the boundaries of the State. Beall Bros. Supply Co. v. Industrial Comm., 341 Ill. 193, 173 N.E. 64; Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 52 S. Ct. 571, 575, 76 L. Ed. 1026, 82 A.L.R. 696. In the Clapper case, the court, in considering the extra-territorial effect to be given the Workmen's Compensation Act of one State by the courts of another under the full faith and credit clause, said: 'The mere recognition by the courts of one state that parties by their conduct have subjected themselves to certain obligations arising under the law of another state is not to be deemed an extra-territorial application of the law of the state creating the obligation * * *.'" 30 N.E. 2d 14, 17, 18.

The preceding specialized argument should not be construed as an admission that this case necessarily presents any unusual conflict of laws questions. There is no reason to be discerned in logic, principle or policy why this California cause of action should not be enforceable in Oregon, just as any other California cause of action should be enforced where process may be obtained against the defendant.

The fact that Oregon has a wrongful death statute which pertains to the incident from which this action

indirectly arose should not be deemed as an ouster of appellant from an Oregon court in which it seeks to prosecute a perfectly valid claim granted by the law of California.

To say that the Oregon wrongful death statute occupies the whole field of law and remedy, and nullifies the creation in California of a cause of action for property damage, is certainly a more startling proposition than the suggestion that appellant here is entitled to proceed on a case, coming from California, in which it can allege and prove appellees' wrong and the appellant's consequent damage. The only unusual feature of this claim, from a conflict of laws standpoint, is that California law should operate upon the Oregon injury; not that appellant should appear in Oregon for redress.

B. Appellant's Common Law Right of Indemnity

As appellant stated at the outset of this brief, there are two grounds for its recovery in this action. The first ground, already discussed, is founded on the provisions of the California Labor Code.

The second ground for recovery is supplied by the common law doctrine of indemnity. This doctrine is of such manifest significance to this case, and is so well adapted to the solution of the peculiar problems presented herein, that it may well be determined to be the most effective line of approach.

Simply stated, the doctrine of indemnity holds that where one person, without actual fault, is subjected to

liability for the actual wrong of another, the latter must indemnify (i.e. recompense) the former. This doctrine may have originated as a simple case of subrogation, the earlier cases apparently being ones where a shipper's insurer was allowed to enforce the shipper's right against the carrier, after paying the shipper for losses sustained because of the carrier's negligence. *Liverpool and G. W. Steam Co. vs. Phenix Ins. Co.,* 129 U.S. 397, 32 L. Ed. 788, 9 S. Ct. 469 (1889).

Today, however, the principle of indemnity has evolved into an equitable system which operates without reference to "subrogation." The right to indemnity is a right distinct from that of the immediately injured person. As proof of this fact, and as vindication of appellant's right to recover, the evolution of the doctrine, as applied to cases like this, must now be described.

A proper introduction to the subject is supplied by *Travelers' Insurance Co. vs. Great Lakes Engineering Works Co.,* (6th C.C.A., 1911) 184 Fed. 426, which was decided during the era in which labor compensation and employer's liability statutes, and insurance therefor, became prominent.

In this case, the defendant Engineering Co. installed a defective steam engine in the plant of the Herancourt Brewing Co. The engine blew out its cylinder head, which struck two employees, Leinhart and Wund, killing Leinhart and injuring Wund. The Herancourt Co., although free of any active culpability in the accident, was nevertheless legally liable for the injury and death of its employees. The plaintiff Travelers Insurance Company insured the Brewing Co. against such employer's liabil-

ity, the policy containing a provision that the Travelers Company should be "subrogated, in case of payment of loss" under the policy, to the Brewing Company's right to recover such losses from persons responsible therefor. The Travelers Company sued the Engineering Company for the amounts paid to Wund, the injured workman, and to the administratrix of the estate of Leinhart, the deceased workman, and also the Court costs and legal expenses incurred in the litigation and settlement of the claims.

The defendant demurred to the complaint on grounds (identical with those advanced here) that the only action that could be maintained for damages resulting from the death of Leinhart was an action for wrongful death; that such an action could be maintained only by Leinhart's administratrix, hence the plaintiff lacked standing to maintain the action. This was rejected by the Circuit Court of Appeals, which said:

> "We are . . . brought to the question whether the insurer, by reason of a contract of indemnity against employer's liability, such as exists here, can maintain an action against a third party whose negligence has caused liability to the insured employer for injuries resulting in the death of its employee.
>
> "The rule is well settled, in fire insurance as well as in marine insurance, that the insurer, upon paying to the assured the amount of a loss on the property insured, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss; this right of the insurer against such other person not resting upon any relation of contract or of privity between them, but arising out of the nature of the contract

of insurance as a contract of indemnity derived from the assured alone, and enforceable in his right only." 184 Fed. 426, 429, 430.

* * * * *

"But it is insisted by defendant that the brewing company could have no right of action against the engineering company for causing the death of Leinhart, for the reason that there is no common law right of action for causing the death of a human being, the right of action being purely statutory—in Ohio the action being required to be brought in the name of the personal representative of the deceased, and for the exclusive benefit of the wife, husband, children, parents, or next of kin of the deceased (Rev. St. Ohio 1908, secs. 6134, 6135) . . . . and that the injury to the insurance company from the death of Leinhart is thus too indirect and remote to give a right of action to the insurance company." 184 Fed. 426, 430.

The Court refuted these contentions. First, the Court adverted to the contractual relation between the engineering company (defendant) and the brewing company, and stated that "The brewing company . . . had, by virtue of its alleged relations with the engineering company, a right of action over against the latter for negligence on its part which caused legal damage to the brewing company. The injury to the brewing company resulting from that negligence was direct and immediate."

"With respect to injuries not causing death, as in the case of Wund, we apprehend this proposition would not be questioned. With respect to the damage resulting from Leinhart's death, *the fact that Leinhart had no right of action is immaterial. There is no attempt to recover here in any right of his.* The ground of the recovery sought is that the engi-

> neering company failed in its primary and positive duty toward the brewing company, whereby the latter company sustained a loss. It can make no difference with its right of action over that the original recovery against it belonged to one person rather than another; to the widow and children rather than to the representative of Leinhart's estate. Under the allegations of the petition, the negligence of the engineering company was the direct and sole cause of Leinhart's death, and thus of the damages suffered by the brewing company. The injury to the insurance company was thus not indirect or remote but was direct and immediate, because it stands in the shoes of the brewing company. We know of no reason, either upon principle or authority, why the doctrine of subrogation, which has been expressly held applicable to indemnity by way of fire and marine insurance, and by at least necessary implication in the case of casualty insurance, should not be held to extend to employer's liability indemnity." (Italics supplied) 184 Fed. 426, 431, 432.

Before following the evolution of the doctrine of indemnity, in which this case performed a major function, several observations are valuable:

First, this case several times used the term "subrogation" to describe the insurer's status. It is very important to notice that the only "subrogation" present here was of the insurer to the *employer's* cause of action; and the Court expressly rejected the argument that the employer or insurer could only succeed to the employee's cause of action.

Second, this case emphatically and unequivocally stated that where an employer suffers liability on account of the injury of a workman by a third party, the

employer obtains a *new cause of action.* It must be conceded that there were contractual relations between the brewing company and the engineering company which enabled the Court to more easily detect a special duty, flowing to the brewing company from the engineering company, not to impose such damage upon the brewing company. But, as later cases will show, the basic principle has been extended so as to impose liability against strangers.

Third, this case clearly states that a cause of action may accrue to an employer on account of his legal liability for wrongful death; and that the existence of a cause of action for wrongful death or recovery by or for the workman is *not* exclusive of the employer's independent cause of action.

The case of *Staples, et al. vs. Central Surety and Ins. Corporation, et al.* (10th C.C.A., 1922), 62 F. 2d 650, illustrates the extent to which the law of indemnity has been expanded since the *Great Lakes Engineering Works* case.

The Sunray Oil Co. contracted with the Staples Drilling Co. for the latter to drill two oil wells on a certain leasehold. Sunray agreed to furnish the rig and derrick, and the Staples Company agreed to supply the necessary tools, equipment and personnel. While Staples was drilling one of the wells, a fire occurred which ruined the derrick. The Sunray Co. thereupon contracted with a person named Bush to build a new derrick. It is apparent there was no special relation between Bush and the Staples Company. Bush carried a policy of work-

men's compensation insurance with the plaintiff Central Surety and Insurance Corporation.

While Bush and his employees were working on the construction of the new derrick, the Staples Drilling Company was engaged in drilling operations nearby. A boiler, operated by the Staples Company, exploded, injuring one Gougler, an employee of Bush. Gougler obtained an award of compensation from the Oklahoma Industrial Commission, which was paid by plaintiff insurance company.

The insurance company then sued the members of the Staples Drilling Company for the amount paid as compensation, and for the legal expenses incurred in connection with Gougler's claim for compensation. The theory upon which plaintiff prevailed was this: that the Staples Company by their negligence imposed liability on Bush, as the employer of Gougler, under the Oklahoma Workmen's Compensation Law; that Bush therefore had a right of action for indemnity as against the Staples Company, and that plaintiff, as Bush's insurer was subrogated to that right. It is essential to observe that the only subrogation was of the insurer to the employer; not of either of them to Gougler's right, if any, against Staples.

The Court said:

> "It is a well-recognized rule, supported by a great weight of authority, that, where one has been subjected to liability, and has suffered loss thereby, on account of the negligence or wrongful act of another, the one has a right of action against the other for indemnity." (Numerous citations with some brief analyses of earlier cases.)

"Upon this settled principle, it is clear that Bush, having been subjected to liability to his employee, Gougler, under the Compensation Law, as a result of the negligence of appellants, had a cause of action, *in his own right,* for indemnity against appellants, at common law entirely independent of any provisions of the Compensation Law (Comp. St. 1921, Okl. sec. 7282 et seq. as amended). And the appellee, having discharged Bush's liability to Gougler, pursuant to its contract of insurance, is subrogated to Bush's right against appellants." (Emphasis added)

* * * * *

"Appellants do not directly deny the existence of this principle of law, nor challenge the controlling effect of the authorities cited. They seek to evade its applicability by two arguments. One is that, under the Oklahoma Compensation Law, as construed by its courts, Gougler's common-law right of action is abolished. This misapprehends entirely the nature of the ground of recovery now under consideration. The appellee does not sue for the unliquidated damages suffered by Gougler; it sues only for the amount it was required to pay out by reason of the negligence of appellants. Precisely the same argument was made in the Great Lakes Engineering W. Co. Case, supra, and was answered by the Sixth Circuit Court of Appeals in these words: 'With respect to the damage resulting from Leinhart's death, the fact that Leinhart had no right of action is immaterial. There is no attempt to recover here in any right of his.' And in the George A. Fuller Company Case (*George A. Fuller Co. vs. Otis Elevator Co.,* 245 U.S. 489, 28 S. Ct. 180, 62 L. Ed. 422), supra, it was held that the employer had a cause of action against the Otis Elevator Company, notwithstanding that it had been adjudicated that the injured servant had no cause of action against the Otis Company.

* * * * *

"We conclude that the judgment below is right. *The negligence of appellants directly resulted in a financial loss to appellee; under elementary principles of the law of torts, recovery may be had therefore.* It is not necessary to determine whether the judgment may also be sustained on the second ground asserted, in subrogation to the rights of Gougler; we need not, therefore, inquire whether Gougler had any right to pursue his remedy against appellants or whether such right had been abrogated by the Compensation Law of Oklahoma. *The Compensation Law of Oklahoma has nothing to do with the case,* except as it fixed a liability upon Bush for the negligence of appellants. If an automobile belonging to Bush had been destroyed by the exploding boiler, he or his insurance carrier could have recovered, and there is nothing in the Compensation Law to the contrary. Where the injury is to Bush's servant, the Compensation Law required Bush to pay; but the financial loss to Bush or his insurance carrier is just as directly the result of appellant's negligence as if its force had been spent upon his automobile instead of his servant. For the same reason, the ownership of the oil and gas lease in question, and the status of Bush and appellants as independent contractors or otherwise become immaterial." 62 F. 2d 650, 653, 653. (Italics supplied)

The force and pertinence of this opinion as a guide to the proper appraisal of the instant case need not be labored. However, some factors of the Staples case are of special significance here.

1. It was held immaterial what the relationship was between the tortfeasor and the employer of the injured employee. In the *Great Lakes Engineering Case,* supra, there was a contractual tie between the employer and the tortfeasor, and the court commented upon that as an

element to be considered in deciding whether the tortfeasor should respond in damages to the employer's insurer.

However, the Staples case placed liability squarely upon the basis that the negligence of the third person had caused liability of the employer to his workman, for which the employer (or his insurer) had a cause of action; and this result would not depend upon any special relationship between the employer and the tortfeasor.

2. The right to indemnity was held to be independent of the injured employee's right of action against the tortfeasor. That is, the injury for which the employer sued was not something that occured to the employee, or which was transferred from employee to employer, but rather an injury directly to the employer by virtue of his liability for workmen's compensation. *The only subrogation involved was that of the insurer to the employer's cause of action for indemnity.*

3. The right to indemnity was held to be independent of the workmen's compensation statute, except as the statute exposed the employer to liability to his workmen.

The next case is the only one discovered, during careful research, in which the facts are almost the same as ours. This case was decided on December 4, 1950, and was not, therefore, even available at the time the present case was considered by the District Court below. It is *Travelers Insurance Company v. Northwest Airlines, Inc.*, 94 F. Supp. 620 (U.S. District Ct., W.D. Wisc.). Especial attention is invited to the interstate aspects of

this case. In March, 1950, one Oliver was killed in Minnesota by the crash of one of defendant's aircraft in which he was a passenger. At the time of his death Oliver was on a business trip for his employer, the J. C. Penney Co. Oliver's employment was subject to the Workmen's Compensation Act of Wisconsin, and the Wisconsin Industrial Accident Commission awarded Oliver's widow a total death and burial benefit of $9600, which it ordered J. C. Penney and its insurer, plaintiff, to pay. The policy contained the usual clause subrogating the plaintiff Travelers Insurance Company to the rights of the J. C. Penney Company to recover against any other person or corporation.

Plaintiff alleged the facts just recited, in somewhat greater detail, the complaint concluding with a claim for "indemnity from the defendant" for the sum of $9600. The defendant moved to dismiss the complaint for two reasons:

(1) That the complaint failed to state a claim against the defendant upon which relief could be granted; and

(2) For failure to join as parties the widow and children of Oliver.

An extended quotation of the opinion seems warranted by the fact that this case considered basic issues almost identical with those present in our controversy.

> "On a motion to dismiss the complaint its allegations are admitted to be true, for the purpose of the motion, and the complaint should be construed in a light most favorable to the plaintiff.
>
> "Plaintiff bases its claim against defendant, as set out in the complaint, solely on an implied contract

of indemnity, *conceding that its claim does not arise under the Minnesota wrongful death statute,* M.S.A. §573.02, or the Wisconsin Workmen's Compensation Act. St. 1949, §102.01 et seq. *It claims indemnity from defendant for the compensation liability that it has discharged, which was imposed on it by defendant's negligence, which caused Oliver's death.* (Italics added)

"Section 102.29(1) of the Wisconsin Compensation Act provides that the employer or insurer shall have the right to make claim or maintain an action in tort against a third party whose negligence results in injury or death of the employee.

"[2] This is not an action in tort, and is independent of any right of Oliver's widow and children to recover damages against the defendant. They have no interest in or connection with plaintiff's claim for indemnity, and are neither necessary or proper parties to this action.

"[3] The Court finds that the complaint states a claim against the defendant in favor of the plaintiff for indemnity.

"[4] The rule that an implied contract of indemnity arises in favor of a person who, without any fault on his part, is compelled to pay damages on account of the negligence of a third person is clearly stated in 42 C.J.S., Indemnity, § 21, pp. 596-597: 'It is a well-recognized rule that an implied contract of indemnity arises in favor of a person who without any fault on his part is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, the former having right of action against the latter for indemnity, provided they are not joint tort-feasors in such sense as to prevent recovery, as discussed infra § 27. This right of indemnity is based on the principle that every one is responsible for his own negligence, and if another person has been compelled by the judgment of a court having jurisdiction to pay the damages which ought to have been paid by the wrongdoer

they may be recovered from him. It exists independently of statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular legal duty not to be negligent.'

"In 27 American Jurisprudence, pp. 465-467, the following is found:

" 'It has been generally stated that a contract of indemnity need not be express, but that indemnity may be recovered if the evidence establishes an implied contract. And although a right of indemnity generally arises by contract, express or implied, it has been said to exist whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.

* * * * *

" 'Accordingly, it has been stated that a person who, without fault on his own part, has been compelled to pay damages occasioned by the primary negligence of another is entitled to indemnity from the latter, whether contractual relations exist between them or not.'

"In the case of Aetna Life Insurance Co. v. Moses, 287 U.S. 530, 53 S. Ct. 231, 233, 77 L. Ed. 477, 482, the court said: 'Notwithstanding the provision of the statute and of the policy permitting an award for compensation to be made against the insurer directly, the function of the insurer is essentially that of indemnifying the employer. The statute contemplates that the payment of compensation should be secured by insurance, and nothing in it indicates that the insurer is to be denied an indemnitor's rights. Subrogation is a normal incident of indemnity insurance.' "

The principal value of this case is its illustration of the manner in which an application of the doctrine of

indemnity facilitates the solution of a problem in which stubborn questions of the conflict of laws might otherwise abound. In that case, as in ours, a death occurred in one state for which there was a workmen's compensation recovery in another. This workmen's compensation recovery was held to have inflicted a legal injury upon the employer to which the insurer succeeded. This route of action avoided the question of the ability of the insurer to enforce a cause of action bestowed by the Wisconsin Workmen's Compensation Act, and it also obviated an inquiry whether the insurer had any possible remedies based upon the Minnesota wrongful death statute.

Equating this case with ours, which is aided by their factual similarity, it is obvious that indemnity is a right of action *supplemental* to and distinct from a wrongful death claim; from which it seems logically to follow that the existence in Oregon of a wrongful death statute should not be deemed exclusive of appellant's right to indemnity. Surely this analysis is fortified by the indemnity cases discussed previously, and it seems to have been squarely held, in a conflict of laws situation, in the *Northwest Airlines* case.

The common theme and rationale of the cases discussed thus far is that an employer who is subjected to workmen's compensation liability because of an injury (or death) inflicted upon his employee by the active negligence of another, has himself directly suffered a remediable legal wrong. The exact character of this legal wrong is possibly an academic inquiry. Surely it would

make no difference in our case, should indemnity be applied, whether the plaintiff's right is founded upon a property damage or upon an implied contract in the nature of a right to restitution, for the limitations of Oregon pertaining to such actions were not expired when this action was commenced (See Appendix, pp. 37, 38).

Moreover, while it may be assumed that the right to indemnity arose in California at the time of the Workmen's Comp. award to Mrs. Buie, and hence had a California common law "origin," it cannot be doubted that such a cause of action is enforceable in Oregon.

Numerous cases have confirmed the availability of an action for indemnity, in a broad range of situations. A few of these cases may be of interest.

The Supreme Court of the United States has recognized the principle of indemnity in several cases. One of them is *George A. Fuller Co. vs. Otis Elevator Co.,* 245 U.S. 489, 62 L. Ed. 422, 38 S. Ct. 180, 1918, where a general contractor was sued by the employee of a subcontractor, who recovered damages for personal injuries suffered because of the negligence of a person for whom the Otis Elevator Company was primarily responsible. The general contractor sued the Otis Company "to recover indemnity"; and Justice Holmes said, tersely, "If the petitioner is right and the primary duty rested on the Elevator Company it may recover in the present suit, unless the former proceedings constitute a bar." 245 U.S. 489, 490, 491.

In *Washington Gaslight Co. vs. District of Columbia,* 161 U.S. 316, 40 L. Ed. 712, 16 S. Ct. 564, a pedestrian

was injured by a defective "gas box" which the defendant gas company maintained on the sidewalk of the plaintiff District. The pedestrian sued the District and recovered for her personal injuries. The District sued the gas company for indemnity. The Court upheld the action, in an opinion which indicates that even at the time of that decision (1896) the indemnity principle was regarded as a salutary and general principle.

In *Busch and Latta Paint Co. v. Woermann Const. Co.,* 310 Mo. 419, 276 S.W. 614, we find another suit for indemnity. The plaintiff employed the defendant to build a scaffold for the use of plaintiff's employees. The scaffold was negligently constructed, and collapsed, injuring the plaintiff's workmen. It was held that the plaintiff, who had paid the employees for their injuries, had a right of indemnity from the defendant.

The doctrine of implied indemnity has been recognized in Oregon, also. In *Astoria v. Astoria and Columbia River R. Co.,* 67 Or. 538, 136 P. 645, 1913, the Oregon Supreme Court decided a case the facts of which are substantially identical with those reported in the Washington Gaslight Case, supra. A pedestrian was injured, while walking on the city's streets, by a dangerous condition caused by the defendant railway. The city was adjudged liable to the pedestrian for $5,000 damages. It was held that the city could recover this amount from the Railroad Company, for, while the city owed the pedestrian a duty of maintaining safe streets, and hence was liable for her injury, the efficient and primary cause of the accident (i.e., the active and actual wrongdoing) was the negligence of the railroad company.

CONCLUSION

The following elements seem to be established by the authorities cited and discussed above:

1. The appellant acquired a cause of action against appellees, by virtue of the California Labor Code, which operated upon the death of James Buie and the order of the California Industrial Accident Commission. This cause of action is entirely distinct from that conferred upon Buie's successors for wrongful death.

2. This California cause of action is founded upon a property damage, and neither the Oregon nor California statutes of limitations, governing such an action, would bar this proceeding.

3. This California cause of action should be enforced in Oregon, both under the general principle that a cause of action may be sued upon whenever process may be obtained, and under conflicts of laws rules relating to Workmen's Compensation cases.

4. That appellant also has a cause of action for indemnity is proven by very strong Federal authorities which support such an action both by clear analogy and by direct decision on almost identical facts. These cases hold that an insurer in appellant's position has a direct common law cause of action against the active tortfeasor, which is independent of the claim of the injured employee; and that this cause of action is moreover independent of any statute.

Upon either main theory, appellant's complaint and the pretrial order state facts upon which relief may and should be granted.

Respectfully submitted,

CAKE, JAUREGUY & TOOZE,
DWIGHT L. SCHWAB,
DENTON G. BURDICK, JR. and
LAMAR TOOZE, JR.

APPENDIX

A.

Statutes of Limitation

I. OREGON.

1. Section 1-202, Oregon Compiled Laws Annotated, provides in part as follows, to-wit:

> " * * * The periods prescribed in the preceding section for the commencement of actions, shall be as follows: * * *"

2. Section 1-203, Oregon Compiled Laws Annotated, provides as follows, to-wit:

> *"Within ten years: Action on judgment, decree or sealed instrument.* Within ten years:
>
> "(1) An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States;
>
> (2) An action upon a sealed instrument."

3. Section 1-204, Oregon Compiled Laws Annotated, provides as follows, to-wit:

> "Within six years:
>
> "1. An action upon a contract or liability, express or implied, excepting those mentioned in section 1-203 and section 1-207, as amended;
>
> "2. An action upon a liability created by statute, other than a penalty or forfeiture, excepting those mentioned in section 1-207, as amended;
>
> "3. An action for waste or trespass upon real property;

"4. An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof."

4. Section 1-205, Oregon Compiled Laws Annotated, provides as follows, to-wit:

"Within three years:

"1. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office; or by the omission of an official duty; including the nonpayment of money collected upon an execution. But this section shall not apply to an action for an escape.

"2. An action upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state, except where the statute imposing it prescribes a different limitation, and except those mentioned in section 1-207, as amended."

5. Section 1-206, Oregon Compiled Laws Annotated, provides as follows, to-wit:

"Within two years. * * *

"(1) An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein especially enumerated; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

"(2) An action upon a statute for a forfeiture or penalty to the state or county."

6. Section 1-207, Oregon Compiled Laws Annotated, provides as follows, to-wit:

"Within one year:

"1. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;

"2. All actions for libel and slander shall be commenced within one year after the cause of action shall have accrued.

"3. All actions for overtime or premium pay and all actions for penalties or liquidated damages for failure to pay overtime or premium pay; provided, that in all cases where a cause of action has already accrued and as to which a statute of limitations has not already run upon the effective date of this act, action must be brought before April 1, 1948."

II. California.

1. Section 312, California Code of Civil Procedure, provides as follows:

"[Commencement of civil actions.]

"Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

2. Section 335, California Code of Civil Procedure, provides as follows, to-wit:

"*Periods of limitation prescribed.* The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: * * *"

3. Section 338, California Code of Civil Procedure, provides, in part, as follows:

"[Within three years:] within three years:

"1. An action upon a liability created by statute, other than a penalty or forfeiture.

"2. An action for trespass upon or injury to real property.

"3. An action for taking, detaining, or injuring any goods, or chattels, including actions for the specific recovery of personal property."

4. Section 339, California Code of Civil Procedure, provides, in part, as follows:

"[Within two years:] within two years:

"1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of section three hundred thirty-seven of this code; * * * *"

B.

California Labor Code

1. Section 3204 of the Labor Code of the State of California provides as follows, to-wit:

"Unless the context otherwise requires, the definitions hereinafter set forth in this chapter shall govern the construction and meaning of the terms and phrases used in this division."

2. Section 3209 of the Labor Code of the State of California provides as follows, to-wit:

" 'Damages' means the recovery allowed in an action at law as contrasted with compensation."

3. Section 3210 of the Labor Code of the State of California provides as follows, to-wit:

> " 'Person' includes an individual, firm, voluntary association, or a public, quasi public, or private corporation."

4. Section 3850 of the Labor Code of the State of California provides as follows, to-wit:

> "As used in this chapter:
>
> "(a) 'Employee' includes the person injured and any other person to whom a claim accrues by reason of the injury or death of the former.
>
> "(b) 'Employer' includes insurer as defined in this division."

5. Section 3851 of the Labor Code of the State of California provides as follows, to-wit:

> "The death of the employee or of any other person, does not abate any right of action established by this chapter."

6. Section 3852, of the Labor Code of the State of California provides as follows, to-wit:

> "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he was liable including all salary, wage, pension,

or other emolument paid to the employee or to his dependents."

7. Section 3853 of the Labor Code of the State of California provides as follows, to-wit:

> "If either the employee or the employer brings an action against such third person, he shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought by personal service or registered mail. Proof of such service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party plaintiff or shall consolidate his action if brought independently."

8. Section 3854 of the Labor Code of the State of California, provides, in part, as follows, to-wit:

> "If the action is prosecuted by the employer alone, evidence of any amount which the employer has paid or become obligated to pay by reason of the injury or death of the employee is admissible, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom. After recouping himself for such special damages, * * * the employer shall pay any excess to the injured employee or other person entitled thereto."

9. Section 3855 of the Labor Code of the State of California provides as follows, to-wit:

> "If the employee joins in or prosecutes such action, either the evidence of the amount of disability indemnity or death benefit paid or to be paid by the employer or the evidence of loss of earning capacity by the employee shall be admissible, but not both. Proof of all other items of damage to

either the employer or employee proximately resulting from such injury or death is admissible and is part of the damages."

10. Section 3857 of the Labor Code of the State of California provides as follows, to-wit:

"The court shall, upon further application at any time before the judgment is satisfied, allow as a further lien the amount of any expenditures of the employer for compensation subsequent to the original order."